A

HAMZAH NAJDI

v.

PP

B

HIGH COURT SABAH & SARAWAK
LINTON ALBERT J
[CRIMINAL APPEAL NO: 42-8-2005]
18 OCTOBER 2006

C ***CRIMINAL PROCEDURE:*** *Appeal - Conviction and sentence, against - Offence of statutory rape - Whether sessions court judge erred in fact and in law - Whether misdirection of sessions court judge fatally flawed - Whether there was a serious miscarriage of justice - Whether conviction quashed - Whether sentence set aside*

D

The appellant (the first accused) was jointly charged with the second accused for the offence of statutory rape and convicted. He was sentenced with an imprisonment term of 15 years and five strokes of whipping. The appeal herein was on both conviction and sentence. The petition of appeal to support the appeal against E conviction set out grounds which were: (1) the sessions court judge had erred in fact and in law when she held that she was prepared to convict the first and second accused on the victim's (PW3) evidence alone; (2) the sessions court judge had failed to consider adequately or at all the defence of the first accused. F

Held (acquitting and discharging the appellant):

(1) The requirement imposed by the sessions court judge on the appellant and the second accused to explain the incriminating G evidence adduced by the prosecution was a travesty of justice which went to the very foundation of our criminal justice system. The fact that the sessions court judge went on to conclude that they have failed to cast a reasonable doubt on the prosecution evidence did not cure the injustice caused by H that misdirection. (para 7)

(2) The misdirection of the sessions court judge as to the burden and standard of proof was also fatally flawed in that, having found PW3 to be a 'truthful, credible and reliable' witness and I prepared to convict on her evidence alone, there was no finding whatsoever that the appellant and the second accused had failed to raise a reasonable doubt as to their guilt. (para 8)

(3) Apart from what may have been the erroneous findings relating to the need to send PW3 to hospital because she was having her menstruation and the washing of PW3's private part to get rid of seminal fluids which 'would form damaging evidence' to connect the appellant to the crime, the sessions court judge had in the circumstances aforesaid, clearly committed grave errors relating to the burden and standard of proof which constituted a serious miscarriage of justice. The conviction was accordingly quashed and the sentence set aside. (para 10)

[Order accordingly.]

Case(s) referred to:
Harun Abdullah v. PP [1998] 3 CLJ 184 CA ***(refd)***
Mohamad Radin Yaakob v. PP [1991] 3 CLJ 169 ***(refd)***
Surandran Rajaretnam v. PP [1998] 2 CLJ 207 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 422

For the appellant - Rosli Gapor; M/s Gapor & Co
For the respondent - Ahmad Zubir Jantan DPP

Reported by Suhainah Wahiduddin

JUDGMENT

Linton Albert J:

[1] The appellant, the first accused in the court below was jointly charged with the second accused for the offence of statutory rape and convicted. He was sentenced with an imprisonment term of 15 years and five strokes of whipping. The charge read as follows:

> That you, jointly with one other still at large on the 21st day of July, 1996, at about 4:30 a.m., at house number 114, Drive 16, Rejang Park, Sibu in the State of Sarawak, committed rape on one Jessica bt. Eyok (f) 14 years and 10 months, and that you have thereby committed an offence punishable under section 376 of the Penal Code, read together with section 34 of the same Code.

[2] The appeal is on both conviction and sentence. The petition of appeal lists out several grounds to support the appeal against conviction out of which two grounds merit consideration. They are these:

(1) The Learned Sessions Court Judge had erred in fact and in law when she held:

> I am even prepared to convict the 1st and 2nd accused on her evidence alone.

(2) That the Learned Sessions Court Judge failed to consider adequately or at all the defence of the 1st accused.

[3] According to the evidence led by the prosecution, the appellant, the second accused and the victim (PW3) together with one still at large (the Chinese man) consumed Carlsberg beer at Pulau Babi before all four went to the Chinese man's house at Rejang Park in his car. PW3 had to be brought to the car because she was weak and giddy. On reaching the house she was brought into the house and laid on a bed next to the bathroom. The appellant and the Chinese man were in the living room not far from the bed while the second accused went back and forth from the living room to the bed where PW3 was laid and physically seduced her. PW3 was half-conscious when she felt somebody on top of her and experienced pain in her private part. She felt three persons take turns to get on top of her and each time there was pain in her private part after which she became unconscious. Before PW3 lost consciousness she did not see any other person in the house apart from the three men who came with her into the house.

[4] The appellant testified on oath and related how he went to the Chinese man's house because he did not have his own vehicle. He said he was not that drunk but dizzy and as a result he fell asleep within a minute of lying on the floor of the living room. He did not know or see what happened to PW3. The next thing he knew was when the second accused woke him up and told him that PW3 was bleeding. He then assisted the second accused to wash PW3 and helped to put a sanitary pad on PW3's private part as well. After that the three of them sent PW3 home.

[5] Medical evidence established that the injuries to PW3's vagina and the area around it including hymenal tears and bleeding vaginal wounds were recently inflicted and caused by the penetration of the vagina by a blunt object such as a penis.

[6] In the grounds of decision the learned Sessions Court judge dealt with all the evidence adduced at the trial with commendable detail and clarity. It is the conclusion on the burden and standard of proof set out in the concluding portion of the grounds of decision that requires judicial scrutiny. The relevant parts are reproduced and are as follows:

> On the whole I find that the 1st accused and 2nd accused stories do not explain most of the incriminating evidence adduced by the prosecution. The 1st accused and 2nd accused story about their belief that Jessica was having menses is not credible. If indeed the bleeding was merely from her menses, why was it necessary for them to wash her private part. If they were concerned about her over bleeding menses, they should have sent her to hospital to get medical treatment ...
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> To my mind in fact, they washed her private part with water in order to get rid of their seminal discharge which would form a very damaging piece of evidence to connect them with the crime.
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> I am satisfied that the defence of both 1st and 2nd accused persons do not cast any reasonable doubt on the prosecution evidence. Therefore, I found both 1st accused and 2nd accused guilty and convicted them of the offence as per charged.
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> I would add that having seen her demeanour while giving evidence in Court, I found Jessica (PW3) to be a truthful, credible and reliable witness. I am very prepared to convict the 1st and 2nd accused on her evidence alone.
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> In this instant case, I have warned myself of the danger of convicting on the absence of corroboration assuming that there is no corroboration. Having been satisfied that the prosecution has proved their case and the defence of both 1st and 2nd accused persons have not cast any reasonable doubt on PP case, on the grounds as stated above, I found both accuseds guilty and charged and convicted them.

[7] The requirement imposed by the learned Sessions Court Judge on the appellant and the second accused to explain the incriminating evidence adduced by the prosecution is a travesty of justice which goes to the very foundation of our criminal justice system and the fact that the learned Sessions Court Judge went on to conclude that they have failed to cast a reasonable doubt on the prosecution evidence does not cure the injustice caused by

that misdirection. I need only refer to the case of *Mohamad Radin bin Yaakob v. Public Prosecutor* [1991] 3 CLJ 169 where Mohamed Azmi SCJ had this to say at p. 171:

> It is a well-established principle of Malaysian criminal law that the general burden of proof lies throughout the trial on the prosecution to prove beyond reasonable doubt the guilt of the accused for the offence with which he is charged. There is no similar burden placed on the accused to prove his innocence. He is presumed innocent until proven guilty. To earn an acquittal, his duty is merely to cast a reasonably doubt in the prosecution case.
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> To earn an acquittal, the court may not be convinced of the truth of the defence story or version. Raising a reasonable doubt in the guilt of the accused will suffice. It is not, however, wrong for the court to be convinced that the defence version is true, in which case the court must order an acquittal. In appropriate cases it is also not wrong for the court to conclude that the defence story is false or not convincing, but in that instance, the court must not convict until it asks a further question, that even if the court does not accept or believe the defence explanation, does it nevertheless raise a reasonable doubt as to his guilt?.

[8] The misdirection of the learned Sessions Court Judge as to the burden and standard of proof is also fatally flawed in that, having found PW3 to be a "truthful, credible and reliable" witness and prepared to convict on her evidence alone there was no finding whatsoever that the appellant and the 2nd accused had failed to raise a reasonable doubt as to their guilt.

[9] Learned DPP suggested that these flaws are curable under s. 422 of the Criminal Procedure Code which reads as follows:

> Irregularities not to vitiate proceedings
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> Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of:
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> (a) of any error, omission or irregularity in the complaint, sanction consent, summons, warrant, charge, judgment or other proceedings before or during trial, or in any inquiry or other proceedings under this Code; or
>
> (b) the want of any sanction; or
>
> (c) the improper admission or rejection of any evidence; or

unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice.

[10] This can be disposed of by referring to the judgments of Shaik Daud, JCA in *Harun bin Abdullah v. Public Prosecutor* [1998] 3 CLJ 184 and in *Surandran a/l Rajaretnam v. Public Prosecutor* [1998] 2 CLJ 207 at p. 211. They are reproduced and are respectively as follows:

... we are in full agreement with the decision in *Ishak Shaari v. PP* where the learned trial judge held that s. 422 of the CPC cannot be invoked to cure a breach where it involves the breach of an explicit provision of the CPC or where the breach involves a principle of general importance in the administration of justice. And as the error committed by the learned sessions court judge in misdirecting herself on the standard of proof on the prosecution fell within both the classifications in the instant appeal, it was incapable of rectification under s. 422 of the CPC.

And;

Therefore, in the instant appeal, we were unanimously in agreement with the submission of Mr. Karpal Singh that the learned sessions judge erred in law when he applied the *prima facie* standard of proof at the close of the case for the prosecution. We held that there was clear misdirection by the trial judge. We also held that a misdirection of this nature, which goes to the very root of the matter, is incapable of being cured by the provision of s. 422 of the Criminal Procedure Code, as the misdirection involves a principle of general importance in the administration of justice.

Apart from what may have been the erroneous findings relating to the need to send PW3 to hospital because she was having her menstruation and the washing of PW3's private part to get rid of seminal fluids which "would form damaging evidence" to connect the appellant to the crime, the learned Sessions Court Judge had in the circumstances aforesaid, clearly committed grave errors relating to the burden and standard of proof which constitute a serious miscarriage of justice. The conviction is accordingly quashed and the sentence set aside. The appellant is acquitted and discharged. Order accordingly.